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Addendum StartPage: 0

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APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY AUTHORIZATION § OF
AND RELATED RELIEF FOR THE §
ACQUISITION OF WIND §
GENERATION FACILITIES § ADMINISTRATIVE HEARINGS

**TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL
SOUTHWESTERN ELECTRIC POWER COMPANY TO RESPOND TO
TIEC'S SECOND SET OF RFIS**

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) files this motion to compel Southwestern Electric Power Company (SWEPCO) to respond to TIEC's Request for Information (RFI) 2-4. Counsel for TIEC and SWEPCO have attempted to negotiate these objections diligently and good faith, but have not reached a resolution. Pursuant to an agreement with SWEPCO's counsel to extend the deadline to September 10, 2019, this motion to compel is timely filed.

II. RESPONSE TO SWEPCO'S OBJECTION

TIEC 2-4 requests the following information:

Please explain why SWEPCO limited the RFP to build-own-transfer projects and did not request proposals for wind purchase power agreements (PPAs). Please provide all analyses, presentations, and internal correspondence regarding SWEPCO's decision to pursue build-own-transfer projects instead of PPAs.

In response, SWEPCO produced a privilege log listing responsive documents that it claims are protected by the attorney-client and work-product privileges.¹ TIEC moves to compel the documents for which SWEPCO is only claiming work-product privilege, which includes the document numbers 15-16 and 19-37. TIEC is not moving to compel document numbers 1-14 or 17-18.

¹ Revised Privilege Log for TIEC's 2nd RFI (Aug. 30, 2019).

SWEPCO has not demonstrated that the withheld documents constitute attorney work product as it has not shown that they were prepared “in anticipation of litigation.”² In order to establish work-product protection, SWEPCO has the burden of demonstrating³ that the documents at issue were “prepared and assembled in actual anticipation of litigation or for trial.”⁴ Texas courts have held that a document has been prepared in anticipation of litigation only if: “(1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue (the objective standard); *and* (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and prepared the document(s) for the purposes of preparing for such litigation (the subjective standard).”⁵ Importantly, for the work-product privilege to apply, preparation for litigation must be the “*primary motivating purpose*” underlying the creation of the document.⁶ Even if litigation is likely, a document is not prepared “in anticipation of litigation” if it is in fact prepared for some other purpose,⁷ as the work-product privilege is “not an umbrella for materials assembled in the ordinary course of business.”⁸

SWEPCO’s statements in the privilege log that the withheld documents “were prepared at request of counsel in anticipation of litigation” do not establish that those documents are protected by the work-product privilege. As an initial matter, it is apparent from the dates on which the responsive documents were created that they were not prepared in anticipation of litigation. All of the responsive documents listed in the privilege log were prepared in October or November of 2018, which is *prior to SWEPCO’s issuance of the request for proposals* (RFP) that resulted in the wind projects for which it is seeking a certificate of convenience and necessity (CCN) in this proceeding. Before SWEPCO issued the RFP in January 2019⁹ (indeed,

² Tex. R. Civ. P. 192.5(a)(1), (2).

³ *In re E.I. du Pont de Nemours and Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (“The party who seeks to limit discovery by asserting a privilege has the burden of proof.”).

⁴ *Wiley v. Williams*, 769 S.W.2d 715, 717 (Tex. App.—Austin 1989, orig. proceeding).

⁵ *In re Maher*, 143 S.W.3d at 912 (citing *Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)) (emphasis added).

⁶ *See, e.g., In re Maher*, 143 S.W.3d 907, 913 (Tex. App.—Fort Worth 2004, no pet.) (emphasis added).

⁷ *Id.*

⁸ *Wiley*, 769 S.W.2d at 717.

⁹ Direct Testimony of Jay F. Godfrey at 5.

before it received the bids from that RFP), it would have been impossible for SWEPCO to know what the results of the RFP would be, whether it would procure any wind projects as a result of the RFP, and whether it would file a CCN application at all.¹⁰ Thus, the withheld documents prepared before the issuance of the RFP fail both the objective and subjective prongs of the “in anticipation of litigation” test established by the Texas Supreme Court.

SWEPCO may argue that at the time it prepared the documents, it knew that if it went forward with the wind projects, it would eventually file a CCN application at the Commission. However, that cannot be sufficient to establish work-product privilege. As a regulated entity, every action that a utility takes is subject to regulation and may be reviewed in a future case before the Commission. Thus, a rule that would allow a utility to shield from discovery any document regarding any action that the utility takes—or even might take in the future—on the grounds that the action would be subject to review in a future case would improperly expand the work-product privilege to include almost any document that a utility prepares. But as set forth above, a document is not protected by the work-product privilege unless preparing for litigation was the primary motivating purpose for the creation of the document.

The documents at issue here fail that test. Indeed, each of the documents for which SWEPCO claimed only the work-product privilege were sent and received entirely by non-attorneys and are labeled with non-litigation-related document titles such as “Communications Plan,” “Regulatory Talking Points,” and “CSP [Customer Savings Plan] EEI [Edison Electric Institute] Info.”¹¹ Thus, it appears that these documents were created by non-attorneys primarily for the purpose of facilitating communications with the public or policymakers; not for the purpose of preparing for litigation.¹² Accordingly, SWEPCO has not met its burden of proving that the withheld documents fall within the protections of the work-product privilege, and it should be compelled to produce them.

¹⁰ Cf. *In re Bonding*, 522 S.W.3d 75, 87 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (holding that emails exchanged prior to when the alleged injury was suffered and on which the subsequent lawsuits were not in anticipation of litigation).

¹¹ Revised Privilege Log for TIEC’s 2nd RFI.

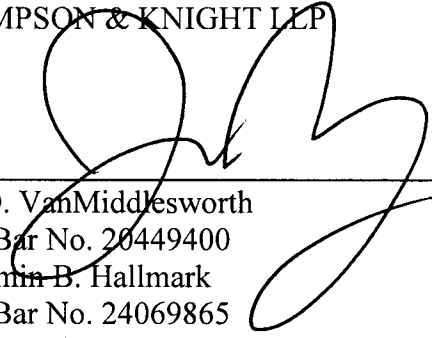
¹² *In re Maher*, 143 S.W.3d at 913 (explaining that in order for a document to be protected by the work product privilege, litigation must be the primary motivating purpose behind the preparation of the document).

III. CONCLUSION

For the foregoing reasons, TIEC requests that its Motion to Compel be granted, and that SWEPCO be required to produce all information responsive to TIEC 2-4. TIEC also requests all other relief to which it is justly entitled.

Respectfully submitted,

THOMPSON & KNIGHT LLP

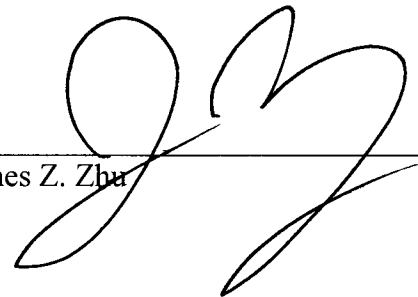


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**ATTORNEYS FOR TEXAS INDUSTRIAL
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CERTIFICATE OF SERVICE

I, James Z. Zhu, Attorney for TIEC, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 10th day of September, 2019 by facsimile, electronic mail and/or first Class, U.S. Mail, Postage Prepaid.



James Z. Zhu